Supreme Court, U.S.
FILED

95 1117 JAN 11 1996

OFFICE OF THE CLERK

No. 95-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

WALTER R. LEGER
D/B/A OFFICE CHAIR MAINTENANCE CO.,
Petitioner,

v.

MITCHELL ADAMS, AS HE IS
COMMISSIONER OF REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

CARL EMMETT BAYLIS
27-29 Mechanic Street
Worcester, Massachusetts 01608
(508) 792-1972

Counsel for Petitioner

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

53 pp

QUESTION PRESENTED FOR REVIEW

May a Massachusetts taxpayer be denied the protection of the Due Process Clause of the Fourteenth Amendment of the United States Constitution when the Massachusetts Commissioner of Revenue fails to provide taxpayer with either a pre-deprivation or prompt post-deprivation notice and hearing and seizes taxpayer's home on the "mere assertion" that the taxpayer may owe Massachusetts sales taxes.

LIST OF PARTIES TO THIS PROCEEDING

Your Petitioner in the instant proceeding is Walter R. Leger, d/b/a Office Chair Maintenance Co., Plaintiff in a proceeding originally commenced in the Massachusetts Superior Court, Worcester District, under Civil Action No. 93-2589A.

The Respondent in this proceeding is Mitchell Adams, Commissioner of Revenue of the Commonwealth of Massachusetts.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties to This Proceeding	ii
Table of Contents	iii
Table of Citations	v
Appendix	vii
Opinion Below	1
Statement of Jurisdiction	2
Constitutional Provisions	2
Statutes Involved	3
Statement of the Case	4
Prior Proceedings	4
A. Nature of the Case	4
B. Facts and Administrative Proceedings	5
C. Judicial Proceedings	8
1. Procedural History .	8
2. Summary of Superior Court Opinion	9
3. Summary of Mass. Supreme Judicial Court Opinion	9

Page

Reasons for Granting the Writ 12

I. A Decision of the Massachusetts Supreme Judicial Court Conflicts With Prior Due-Process Decisions of the U. S. Supreme Court 12

II. Argument 13

A. The Petitioner is to be afforded a pre-deprivation notice and hearing before an impartial tribunal 13

B. If there is an extra-ordinary situation where some valid government interest is at stake in the particular property seized, the Petitioner is to be afforded a prompt post-deprivation notice and hearing before a judge 21

Conclusion 23

TABLE OF CITATIONS

Page

Constitutional Provisions

U.S. Constitution, Fourteenth Amendment 2,21

Cases

Armstrong v. Manzo, 380 U.S. 545 (1965) 21

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 11,21

Fuentes v. Shevin, 407 U.S. 67 (1971) ..... passim

Gildea v. Ellershaw, 363 Mass. 800 (1973) 6

Harmelin v. Michigan, 501 U.S. 957 (1991) 15

Leger v. Commissioner of Revenue, 421 Mass. 168 (1995) ..... passim

Logan v. Zimmerman Brush, 455 U.S. 422 (1981) 21

Mathews v. Eldridge, 424 U.S. 319 (1976) ..... passim

Matthews v. Rakiey, 38 Mass. App. Ct. 490 (1995) 16

U.S. v. $8,850, 461 U.S. 555 (1982) 22

United States v. James Daniel Good Real Property, 114 S.Ct. 492 (1993) ..... passim

Page

Statutes and Regulations

26 U.S.C., s. 6212 20
26 U.S.C., s. 6213 20
26 U.S.C., s. 6851 20
26 U.S.C., s. 6861 20
26 U.S.C., s. 7481 20
26 U.S.C., s. 7483 20
28 U.S.C., s. 1254(1) 2

M.G.L. c. 62C, s. 37 6
M.G.L. c. 62C, s. 39(c) 7
M.G.L. c. 62C, s. 50 7
M.G.L. c. 62C, s. 50(a) 3
M.G.L. c. 211, s. 3 2
M.G.L. c. 214, s. 1 2

Other Authorities

MASSTAX GUIDE ADMINISTRATIVE PROCEDURE, VOL. 5 (1993), s. 628.4 (1993) 6

APPENDIX

Page

Appendix A

Opinion and Judgment of Supreme Judicial Court for Commonwealth of Massachusetts 1a

Appendix B

Memorandum of Decision and Notice of Judgment Entry of Superior Court, Worcester District 10a

No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

WALTER R. LEGER
d/b/a OFFICE CHAIR MAINTENANCE CO.

Petitioner,

vs.

MITCHELL ADAMS, as he is
COMMISSIONER OF REVENUE

Respondent.

Petition for Writ of Certiorari
to the Supreme Judicial Court
of the Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Walter R. Leger v. Commissioner of Revenue
421 Mass. 168 (1995)

STATEMENT OF JURISDICTION

Your Petitioner appeals from the Opinion and Judgment of the Massachusetts Supreme Judicial Court filed on September 13, 1995.

Original jurisdiction for the proceeding in the Massachusetts Superior Court, Worcester District, was founded on M.G.L. c. 214, s. 1.

Review by the Massachusetts Supreme Judicial Court was pursuant to M.G.L. c. 211, s. 3.

This Petition for a Writ of Certiorari is brought pursuant to 28 U.S.C., s. 1254(1).

Pursuant to a written request made by Petitioner under Rule 22 of the Rules of the Supreme Court of the United States, an extension of thirty (30) days, to January 11, 1996, was granted through the Court by Justice Souter.

CONSTITUTIONAL PROVISIONS

AMENDMENT XIV

Section 1. ...; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution,
Fourteenth Amendment, Section 1

STATUTES INVOLVED

M.G.L. c. 62C, s. 50(a)

s. 50. Liens upon property for nonpayment of taxes

(a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount, including any interest, additional amount, addition to tax, assessable penalty or forfeiture, together with any costs that may accrue in addition thereto, shall be a lien in favor of the commonwealth upon all property and rights to property, whether real or personal, belonging to such person. The lien shall arise at the time the assessment is made or deemed to be made and shall continue until the liability for the amount assessed or deemed to be assessed is satisfied. Said lien shall in any event terminate not later than six years from the date it was created.

STATEMENT OF THE CASE

Your Petitioner respectfully requests this Court review a decision rendered by the Massachusetts Supreme Judicial Court.

PRIOR PROCEEDINGS

A. Nature of the Case

Walter R. Leger ("Leger") did business as a sole proprietor reupholstering office chairs brought in by customers. Leger collected a sales tax from customers for materials used, but did not charge or collect a sales tax on the cost of the labor.

The Department of Revenue (the "Department") determined that Leger should have collected sales tax on the labor charges. Subsequent to a hearing before the Department's Appeal and Review Bureau (the "Appeal Bureau"), Leger was notified that the Appeal Bureau agreed with the Audit Bureau in that reupholstering constitutes a taxable sale of tangible personal property. Following this notification, and without any hearing, the Department, on or about November 6, 1992, filed a Massachusetts Tax Lien against Leger's home.

Leger contends that, absent a showing of exigent circumstances, the Constitutions of the United States and the Commonwealth of Massachusetts prohibit the Department from placing a lien on or seizing his home without first affording him either a pre-deprivation notice and

hearing or, assuming exigent circumstances, a prompt post-deprivation notice and hearing.

B. Facts and Administrative Proceedings

The facts critical to this matter were never in dispute and are largely contained in an opinion dated September 13, 1995, of the Massachusetts Supreme Judicial Court. See Leger v. Commissioner of Revenue, 421 Mass. 168 (1995).

Leger operated a sole proprietorship called Office Chair Maintenance Co. between 1975 and October 1987. Leger reupholstered worn office chairs brought in by customers. He collected a sales tax from his customers for the cost of materials, but did not charge or collect sales tax on the cost of labor.

After an examination of Leger's books by the Audit Bureau of the Department, the Department determined that Leger should have collected sales tax on the labor charges in his reupholstering business. As a result, the Department disallowed Leger's deduction for his labor charges.

The Audit Bureau of the Department sent notices of intention to assess sales and use tax for the periods October 1, 1989 through March 31, 1990, January 1, 1985 through September 30, 1985, and July 1, 1987 through September 30, 1989.

An administrative review on the substantive tax issue only was granted to Leger by the Department's Appeal and Review Bureau.[1]

Leger was notified by a letter dated April 24, 1992, of the Appeal Bureau's opinion that reupholstering constitutes the taxable sale of tangible personal property.

The Commissioner made a deficiency assessment on May 11, 1992, and mailed a notice of assessment to Leger on June 23, 1992. A demand for payment of the assessed taxes was sent to Leger on August 8, 1992, and a consolidated bill was mailed on September 1, 1992.

On September 1, 1992, Leger applied to the Commissioner, pursuant to M.G.L. c. 62C, s. 37, for an abatement of the sales tax which had been assessed. The Commissioner denied his application.

While Leger pursued these administrative remedies, he did not pay any of the contested taxes. On September 2, 1992, the Department notified Leger by a form letter (Form ID 00021) that if he failed to make payment within ten days, it would institute collection actions to

---

1. The Commissioner's regulations specifically state that relief may be denied if "the relief sought would require a determination that a Massachusetts taxing statute is unconstitutional on its face." MASSTAX GUIDE ADMINISTRATIVE PROCEDURE, VOL. 5 (1993) ("DOR Admin. Proc."), s. 628.4 (1993).

secure payment of the amounts owed. The letter informed Leger that "[s]pecifically, these actions can and will include the filing of tax liens against your property, levying your bank accounts and/or wages and seizure of your assets."

On November 6, 1992, the Department filed a notice of Massachusetts tax lien (lien notice) against Leger's residence with the Secretary of the Commonwealth under M.G.L. c. 62C, s. 50 (1994 ed.). Notice of the lien was also recorded in the Worcester District Registry of Deeds. The Department did not notify Leger that it had placed a lien on his house.

Leger first learned of the lien over a month later on December 11, 1992, when his application for an equity line of credit for the purpose of financing his company was denied by the Workers Credit Union of Fitchburg because of the tax lien. Unable to pay its debts (including the alleged tax debt), Leger's company filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the District of Massachusetts, Docket No. 93-42303, on August 24, 1993.

On December 16, 1993, and May 10, 1993, Leger filed appeals with the Appellate Tax Board ("ATB") pursuant to M.G.L. c. 62C, s. 39(c), which permits the contesting of the imposition of taxes without the payment of any portion of such proposed tax.

From November 6, 1992, to the present,[2] Leger has had *neither* a pre-deprivation notice and hearing nor a post-deprivation notice and hearing -- prompt or otherwise -- related solely to the issue of seizure.

C. Judicial Proceedings

1. Procedural History

On November 1, 1993, Leger filed a Complaint in Worcester Superior Court seeking injunctive relief, alleging that the Commissioner violated his Federal and State constitutional rights to procedural due process by denying him a prior notice and hearing before the Department encumbered his property with its lien.

Petitioner contended in his Complaint in Superior Court that the Commissioner cannot arbitrarily place a lien on his home without affording him either a pre-deprivation notice and hearing or, assuming exigent circumstances, a prompt post-deprivation notice and hearing before an impartial adjudicator as to the necessity for the lien (an issue separate and apart from the substantive issue of whether or not taxes are due and owing).

---

2. This case has now been scheduled for a hearing before the ATB on May 16, 1996.

2. Summary of Superior Court Opinion

In its Memorandum of Decision and Order dated July 15, 1994, the Superior Court held that:

> ... the collection of tax by summary process, with judicial review only afforded after the assessment, does not violate due process. [citations omitted] ... The government's interest in collecting taxes is so "exceedingly strong" that a state need not provide predeprivation process, even in the absence of exigent circumstances. Slip Opinion, pages 8-9.

However, the Superior Court never addressed the issue of the lack of a post-deprivation notice and hearing -- prompt or otherwise.

3. Summary of Mass. Supreme Judicial Court Opinion

On appeal, the decision of the Superior Court was affirmed by the Massachusetts Supreme Judicial Court ("SJC"). In its opinion -- Leger v. Commissioner of Revenue, 421 Mass. 168 (1995), the SJC came to certain conclusions with which the Petitioner disagrees:

A. Even though the seizure of property is involved, a taxpayer is not entitled to any pre-deprivation notice and hearing.

> ... However, as for the assessment and collection of taxes, it is well established that postdeprivation procedures may satisfy the demands of due process. Id at 172.
>
> Allowing taxpayers to litigate the validity of assessed taxes prior to payment could pose a threat to the government's financial security, "by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." Id at 172, n. 7.

B. That if the taxpayer believes three years is too long for a prompt post-deprivation hearing to take place, the problem should be addressed by the Legislature and not the courts.

> As his final argument, Leger contends that the prospect of a long-delayed proceeding before the board violates due process. Leger does not argue that such proceedings themselves are not consonant with due process,[3] but rather that the long delay before the board considers his case will

---

3. The SJC has misstated Petitioner's position. Petitioner never agreed that such proceedings on the issue of seizure before the ATB are "consonant with due process." Also, Petitioner never agreed that the attachment of a bank account or coercing of taxpayer to pay money satisfies the due process. See Leger at 173.

> frustrate the requirements of due process. This may be so, but we believe that this issue is a matter initially for the Legislature, or, one that can be addressed only when it is ripe for judicial review, in an appeal from a decision of the board.[4] Id at 175.

The U. S. Supreme Court has set forth its position on whether the Legislature affords due process protection to an individual.

> ... the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. ... The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. ... " See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985).

---

4. The issue of a prompt post-deprivation hearing is moot since the SJC has determined that there is no requirement for any post-deprivation hearing -- prompt or otherwise -- absent explicit legislative action.

REASONS FOR GRANTING THE WRIT

I

A DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT CONFLICTS WITH PRIOR DUE-PROCESS DECISIONS OF THE U. S. SUPREME COURT.

The conclusion of the Massachusetts Supreme Judicial Court (the "SJC") is in conflict with the present position of the U. S. Supreme Court as follows:

1. The SJC has disregarded the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), regarding due process procedure when administrative action results in the taking of taxpayer's property;

2. The SJC has erroneously concluded that when taxes are involved, there is no need for either a pre-deprivation notice and hearing or a prompt post-deprivation notice and hearing on the issue of seizing a taxpayer's home; and

3. The SJC has misinterpreted due process of law by concluding that if there is an unusual delay in holding a prompt post-deprivation hearing, it is not the courts' responsibility to rectify the situation, but rather the responsibility of the Petitioner who must first go to the Legislature for a solution.

II

ARGUMENT

The Due Process Clause requires that before the Massachusetts Commissioner of Revenue is permitted to seize Petitioner's home on the bare assertion that taxes may be due and owing:

A. The Petitioner is to be afforded a pre-deprivation notice and hearing before an impartial tribunal.

B. If there is an extraordinary situation where some valid government interest is at stake in the particular property seized, the Petitioner is to be afforded a prompt post-deprivation notice and hearing before a judge.

A. The Petitioner is to be afforded a pre-deprivation notice and hearing before an impartial tribunal.

Petitioner contends that the general rule of due process as defined by this Court is that there must be notice and a hearing prior to a taking.

> The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case," Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent

> proceedings [if any]," Boddie v. Connecticut, 401 U.S. 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. Fuentes v. Shevin, 407 U.S. 67, 82 (1971).

In the instant suit, the Commissioner never alleges that the collection of the proposed tax was in jeopardy. Consequently there are no exigent circumstances justifying a taking prior to any deprivation notice and hearing.

However, assuming that an extraordinary situation may exist, it is the position of this Court that there must be a balancing of the competing interests of the Petitioner and the Massachusetts Commissioner of Revenue.

> Whether the seizure of real property [Petitioner's home] for purposes of civil forfeiture [tax collection] justifies such an exception [to the right to prior notice and a hearing] requires an examination of the competing interests at stake, along with the promptness and adequacy of later procedures. See United States v. James Daniel Good Real Property, 114 S.Ct. 492, 501 (1993).

An examination of the "competing interests at stake" referred to in Good, supra, has been set forth as three factors in Mathews v. Eldridge.

> ..., resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interest that are affected. ... More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [emphasis supplied] Id, at 335.

First, in the instant suit the private interest that will be affected is the taxpayer's home, which, by its very nature, "is a private interest of historical and continuing importance." United States v. Good Real Property, Ibid.

Second, since there has been no independent neutral hearing on the issue of seizure, the risk of erroneous deprivation is great.

> ... It makes sense to scrutinize governmental action more closely when the State stands to benefit. See Harmelin v. Michigan, 501 U.S. 957, 978, n.9 (1991).

The risk of erroneous deprivation by the action of the Commissioner is emphasized by the fact that if the Commissioner is proven wrong -- that no tax is ultimately due and owing -- the Petitioner is precluded under the present laws of the State of Massachusetts to collect damages -- he has no adequate remedy at law.

The Respondent, a public official, based on the facts herein, has qualified immunity. See Gildea v. Ellershaw, 363 Mass. 800 (1973).

Furthermore, even if this were a violation of a civil right (i.e., due process) there is still a qualified immunity as indicated in the recent case of Matthews v. Rakiey, 38 Mass. App. Ct. 490, 493 (1995).

Finally, the administrative and fiscal burdens that such an additional substitute would entail is de minimus -- i.e., having a motion heard by a court just as would any other potential creditor or placing a lien on Debtor's property. The burden of a hearing is relatively minor since the Government must provide a hearing at some point. The Court system has already been set up. See Fuentes, at 90, n. 22.

Petitioner believes that applying the test of Mathews to the facts of this case entitles him to the conclusion that there is no extraordinary circumstance which would justify denying nim a pre-deprivation notice and hearing.

The most recent U.S. Supreme Court case that upholds the Petitioner's position -- particularly in the tax collection area -- is U.S. v. Good Real Property, supra.

In Good, the Supreme Court reaffirmed "the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." (emphasis supplied). See Good at 498.

On January 31, 1985, Hawaii police officers executed a search warrant at the home of claimant James Daniel Good. The search uncovered about 89 pounds of marijuana, marijuana seeds, vials containing hashish oil and drug paraphernalia. He was sentenced to one year in jail and five years' probation. On August 8, 1989, four and one-half years after the drugs were found, the United States filed an in rem action in the United States District Court for the District of Hawaii, seeking to forfeit Good's house and the four-acre parcel on which it was situated. The United States sought forfeiture on the ground that the property had been used to commit or facilitate the commission of a Federal drug offense. On August 21, 1989 the Government seized the property without prior notice to Good or an adversary hearing.

The issue as framed by the Supreme Court was:

> ... whether, in the absence of exigent circumstances, the Due Process Clause of the Fifth

Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard. Id at 497.

The Supreme Court held:

> The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.
>
> The Government does not, and could not, dispute that the seizure of Good's home and four-acre parcel deprived him of property interests protected by the Due Process Clause. ... it [the Government] argues that the seizure of real property under the drug forfeiture laws justifies an exception to the usual due process requirement of pre-seizure notice and hearing. Id at 498-499.

The Court in Good repudiated the Government's contention that the ex parte seizure complied with the Due Process clause. It concluded that:

> The right to prior notice and a hearing is central to the Constitution's command of due process. "The purpose of this requirement is not only to ensure abstract fair play to the

> individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivation of property ..." See Fuentes v. Shevin, 407 U.S., at 80-81. Good, at 500-501.
>
> Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance. Id at 500-501.

The Supreme Court in Good held that even a convicted drug felon was entitled to a hearing before the government could seize his real property on the grounds that it had been used in furtherance of his drug dealing.

Thus, absent a showing of extra-ordinary exigent circumstances, Leger, like Good, was entitled to a prior notice and a prior hearing before the lien could constitutionally be imposed against his property.

In arriving at its conclusion as to what may be exigent circumstances to justify a taking of a taxpayer's property followed by a prompt post-deprivation notice and hearing, the Court in Good indicated that the rule of executive urgency ("the prompt payment of taxes without any pre-deprivation notice and hearing") no longer exists:

> The current Internal Revenue Code prohibits the Government from levying upon a deficient taxpayer's property without first affording the taxpayer notice and an opportunity for a hearing, unless exigent circumstances indicate that delay will jeopardize the collection of taxes due.
>
> Just as the urgencies that justified summary seizure of property in the 19th century had dissipated by the time of Phillips, neither is there a plausible claim of urgency today to justify the summary seizure of real property under s. 881(a)(7). Although the Government relies to some extent on forfeitures as a means of defraying law enforcement expenses, it does not, and we think could not, justify the prehearing seizure of forfeitable real property as necessary for the protection of its revenues. Good at 505.

The Federal Internal Revenue Service ("IRS") has successfully collected revenues for decades even though the Internal Revenue Code has long required a prior hearing before an independent judicial body, unless specific exigent circumstances show that delay will jeopardize the collection of taxes due. See 26 U.S.C., s. 6212, 6213, 6851, 6861. The IRS in a tax deficiency procedure may not levy against a taxpayer's property absent exigent circumstances until the decision of the U.S. Tax Court becomes final ninety days after the decision is entered unless a timely appeal is filed and decision rendered by a U.S. Court of Appeals. See 26 U.S.C., s. 7481, 7483.

B. If there is an extraordinary situation where some valid government interest is at stake in the particular property seized, the Petitioner is to be afforded a prompt post-deprivation notice and hearing before a judge.

Meaningful Time

Even if it is assumed that a prompt post-deprivation notice and hearing is all that procedural due process requires, the next logical question to be asked is, is the post-deprivation hearing held "at a meaningful time." See Armstrong v. Manzo, 380 U.S. 545, 552 (1965).[5]

The issue is fact-specific and there can be no general rule.

> The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Fuentes, at 86.

In Logan v. Zimmerman Brush, 455 U.S. 422, 437 (1982), the Supreme Court held that a five-day delay which deprived employee of a statutorily created property right violated the Due Process Clause.

---

5. For further commentary on constitutional restraints on timing, see Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), Justice Brennan's observations at 553-556.

In U.S. v. $8,850, 461 U.S. 555 (1982), the Court held that an 18-month delay was significant unless there was good reason shown. In that suit, the Government convinced the Court that it was trying to resolve the issue with utmost speed.

However, in reviewing the aforementioned cases, in U.S. v. $8,850 an 18-month delay was significant. It is submitted by the Petitioner that a three and a half year delay, without any Government reason, between the time of the lien being placed until the time of the tentative hearing is unconscionable and violates the "meaningful time" requirement.

In summary, it is Petitioner's contention that the Massachusetts Supreme Judicial Court has denied any pre-deprivation notice and hearing or post-deprivation notice and hearing -- prompt or otherwise -- on the issue of seizure and that the taxpayer can only seek legislative relief to his problem -- in effect, transferring taxpayer's due process protection from the courts to the Legislature.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to review the Opinion and Judgment of the Massachusetts Supreme Judicial Court as entered in this matter.

Respectfully submitted,
Walter R. Leger, d/b/a
Office Chair Maintenance Co.,
Petitioner, by his Attorney

CARL EMMETT BAYLIS, ESQ.
27-29 Mechanic Street
Worcester, Massachusetts 01608
(508) 792-1972

Dated: January 8, 1996

APPENDIX

Page

Appendix A

Opinion and Judgment of Supreme Judicial Court for Commonwealth of Massachusetts 1a

Appendix B

Memorandum of Decision and Notice of Judgment Entry of Superior Court, Worcester District 10a

WALTER R. LEGER *vs.* COMMISSIONER OF REVENUE.

Worcester. April 5, 1995. - September 13, 1995.

Present: LIACOS, C.J., WILKINS, ABRAMS, & O'CONNOR, JJ.

Taxation, Sales and use tax, Tax lien. *Due Process of Law*, Taxation.

The attachment of a tax lien to a residence by the State Department of Revenue to secure the payment of assessed taxes without a prior judicial hearing did not violate the property owner's right to due process under the Fourteenth Amendment to the Constitution of the United States or art. 10 of the Declaration of Rights of the Massachusetts Constitution, where the attachment followed the owner's refusal to pay the taxes or to post some security for payment in lieu of the attachment and where all taxpayers' due process rights were adequately protected by the available postdeprivation procedures. [171-175]

CIVIL ACTION commenced in the Superior Court Department on November 1, 1993.

The case was heard by *Barbara A. Lenk*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Carl Emmett Baylis for the plaintiff.

Pierce O. Cray, Assistant Attorney General, for the Commissioner of Revenue.

LIACOS, C.J. The plaintiff, Walter R. Leger, filed a complaint in the Worcester Superior Court seeking declaratory and injunctive relief from a tax lien attached to his residence by the Department of Revenue (department) to secure payment of taxes allegedly owed by Leger. In Count I, Leger sought a declaration that the cost of labor in reupholstering furniture, a commercial activity in which he engaged, is a service which is not subject to the sales tax under G. L. c. 64H, §§ 1 and 2 (1994 ed.). In Count II, Leger alleged that the placing of a lien on his residence prior to a judicial

hearing was in violation of the Fourteenth Amendment to the United States Constitution and art. 10 of the Declaration of Rights of the Massachusetts Constitution. Leger moved for partial summary judgment on Count II regarding his due process rights. The Commissioner of Revenue's (commissioner's) motion to dismiss Count I under Mass. R. Civ. P. 12 (b) (1), 365 Mass. 754 (1974), for failure to exhaust administrative remedies was granted by a judge in the Superior Court.[1] With respect to Count II, the judge denied Leger's motion for summary judgment and allowed the commissioner's motion for partial judgment on the pleadings under Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974), and motion to dismiss under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974).[2]

Leger appealed to the Appeals Court, claiming that the attachment of a tax lien to his residence prior to a judicial hearing violated his right to due process under the Fourteenth Amendment and art. 10. We granted his application for direct appellate review. We now affirm.

The facts as stated by the judge are these.[3] Leger operated a sole proprietorship called Office Chair Maintenance Company (company) between 1975 and October, 1987. The company reupholstered worn office chairs brought in by customers. Leger collected a sales tax from his customers for the cost of materials, but did not charge or collect sales tax on the cost of labor.

After an examination of Leger's books by the audit bureau of the department, the department determined that Leger should have collected sales tax on the labor charges in his

[1]The issue whether labor charges associated with the reupholstering of furniture are subject to sales tax under G. L. c. 64H, §§ 1 and 2, is still pending before the Appellate Tax Board.

[2]The partial judgment consisted of a declaration that the commissioner did not violate Leger's due process rights.

[3]As stated by the judge, the material facts contained in the record are not in dispute.

reupholstering business.[4] As a result, the department disallowed Leger's deduction for his labor charges. On September 14, 1990, the audit bureau sent two notices of intention to assess sales and use tax, one to the company for the period October 1, 1989, through March 31, 1990, and one to Leger doing business as the company for the periods January 1, 1985, through September 30, 1985 and July 1, 1987, through September 30, 1989. By letter dated September 17, 1990, Leger waived his right to an office conference pursuant to G. L. c. 62C, § 26 (*b*), but requested, and was granted, an administrative hearing before the department's appeal and review bureau (appeal bureau). Leger was notified by a letter dated April 24, 1992, of the appeal bureau's opinion that reupholstering constitutes the taxable sale of tangible personal property.

[4]The commissioner may assess additional taxes if it is determined that a taxpayer owes more than reported on the submitted tax return. G. L. c. 62C, § 26 (*b*) (1994 ed.). Prior to an assessment being made, the commissioner must send the taxpayer a notice of intention to assess, showing the type of tax and the relevant tax periods. *Id.* At the time of this action, a taxpayer had thirty days after the issuance of the notice to request, and be available for, a conference. According to the department's administrative procedures in place at the time of this action, the taxpayer could also request a discretionary hearing before the appeal and review bureau (appeal bureau). (According to an affidavit of the chief of the appeal bureau, these procedures were amended, effective July, 1993, to provide all taxpayers, upon request, with a preassessment hearing before the appeal bureau, and the conference is no longer an option.) The commissioner may assess the taxes once these remedies have been exhausted. G. L. c. 62C, § 26 (*b*).

When the deficiency is assessed, a lien automatically is created on the taxpayer's assets. G. L. c. 62C, § 50 (*a*) (1994 ed.). In the case of a lien on real property, however, a lien is not valid against "any mortgagee, pledgee, purchaser or judgment creditor" until notice of the lien is recorded in the registry of deeds. G. L. c. 62C, § 50 (*b*) (1994 ed.). A taxpayer may contest a deficiency assessment by requesting that the commissioner abate the assessment. G. L. c. 62C, § 37 (1994 ed.). Moreover, the taxpayer may request a hearing on the abatement request. *Id.* If the commissioner does not grant the abatement request, the taxpayer may appeal to the Appellate Tax Board (board). G. L. c. 62C, § 39 (1994 ed.). An adverse decision by the board may be appealed to the Appeals Court. G. L. c. 58A, § 13 (1994 ed.). A taxpayer may also seek declaratory relief in the Superior Court in limited circumstances. See, e.g., *Space Bldg Corp. v. Commissioner of Revenue*, 413 Mass. 445, 448-449 (1992).

The commissioner made a deficiency assessment on May 11, 1992, and mailed a notice of assessment to Leger on June 23, 1992. A demand for payment of the assessed taxes was sent to Leger on August 8, 1992, and a consolidated bill was mailed on September 1, 1992.

On September 1, 1992, Leger applied to the commissioner, pursuant to G. L. c. 62C, § 37, for an abatement of the sales tax which had been assessed. The commissioner denied his application in two separate rulings, one dated on or before December 16, 1992,[5] and the other dated April 5, 1993, each of which Leger appealed to the Appellate Tax Board (board) pursuant to G. L. c. 62C, § 39 (*c*). These issues are still pending.

While Leger pursued these administrative remedies, he did not pay any of the contested taxes. On September 2, 1992, the department notified Leger that, if he failed to make payment within ten days, it would institute collection actions to secure payment of the amounts owed. The letter informed Leger that "[s]pecifically, these actions can and will include the filing of tax liens against your property, levying your bank accounts and/or wages and seizure of your assets." On November 6, 1992, the department filed a notice of Massachusetts tax lien (lien notice) against Leger's residence with the Secretary of the Commonwealth under G. L. c. 62C, § 50 (1994 ed.).[6] Notice of the lien was also recorded in the Worcester County registry of deeds.

Prior to the lien notice's being filed, Leger had had a hearing before the department's appeal bureau, but had had neither a determination of the commissioner's abatement decision, a hearing before the board, nor a judicial hearing.

[5]The date of the first denial is unclear in the record. Logically, it must have preceded December 16, 1992, the date when Leger filed his appeal with the board.

[6]Leger contends that he first learned of the lien on December 11, 1992, when his application for a home equity line of credit was denied because of the lien's existence. The Superior Court judge determined that this contention was not a material fact in the context of her decision.

Leger argues that he has a right, under both the Federal and Massachusetts Constitutions, to notice and a judicial hearing before a lien securing payment of taxes may be attached to his real property. We recognize that the attachment of a lien to an individual's residence affects a property interest that is protected by the due process clause of the Fourteenth Amendment. *Connecticut* v. *Doehr*, 501 U.S. 1, 12 (1991). See *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). In a case such as this one, the procedural requirements of art. 10 are substantially the same as those under the Fourteenth Amendment. *School Comm. of Hatfield* v. *Board of Educ.*, 372 Mass. 513, 514, 515 & n.2 (1977).

Generally, due process requires that an individual must receive notice and a hearing prior to governmental deprivation of property. *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 500 (1993). *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972). However, as for the assessment and collection of taxes, it is well established that postdeprivation procedures may satisfy the demands of due process.[7] *Reich* v. *Collins*, 115 S. Ct. 547, 550 (1994). *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation of Fla.*, 496 U.S. 18, 37 (1990). *Fuentes* v. *Shevin, supra* at 91-92. *Phillips* v. *Commissioner of Internal Revenue*, 283 U.S. 589, 595-597 (1931). *Haverhill Manor, Inc.* v. *Commissioner of Pub. Welfare*, 368 Mass. 15, 24-25, cert. denied, 423 U.S. 929 (1975). Accordingly, the commis-

[7]Allowing taxpayers to litigate the validity of assessed taxes prior to payment could pose a threat to the government's financial security, "by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation of Fla.*, 496 U.S. 18, 37 (1990).

Leger argues that recent decisions of the Supreme Court require us to reconsider the rule that postdeprivation proceedings in tax cases satisfy due process. E.g., *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 504 (1993); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 (1972). The Supreme Court, however, recently reaffirmed the constitutionality of postdeprivation proceedings. *Reich* v. *Collins*, 115 S. Ct. 547, 550 (1994). Thus, Leger's argument is refuted by the Supreme Court.

sioner need not provide to Leger any forum for a hearing before collecting taxes that have been assessed.

Leger does not dispute the constitutionality of postdeprivation proceedings per se. Rather, Leger contends that where the deprivation is the attachment of a lien to real property, as opposed to the payment of money, predeprivation proceedings are necessary to satisfy due process. We are not convinced. We see no significant distinction between a deprivation by payment of money and a deprivation by attachment of a lien to real property.[8]

General Laws c. 62C, § 53 (*a*) (1994 ed.), confers authority on the commissioner to "levy upon all property and rights to property," including a person's real estate or bank account, belonging to a person who has not paid an assessed tax within ten days after demand. *Prudential-Bache Sec., Inc.* v. *Commissioner of Revenue*, 412 Mass. 243, 245 (1992). Thus, in our reported decisions, taxpayers typically have paid assessed taxes and penalties prior to participating in administrative and judicial proceedings regarding the validity of tax assessments. See, e.g., *Commissioner of Revenue* v. *Kelly-Springfield Tire Co.*, 419 Mass. 262, 264 (1994) (taxpayer paid assessment in full and then filed application for abatement); *Space Bldg. Corp.* v. *Commissioner of Revenue*, 413 Mass. 445, 446 (1992) (taxpayer paid taxes together with interest accrued and then filed applications for abatement); *Commissioner of Revenue* v. *New England Power Co.*, 411 Mass. 418, 420 (1991) (taxpayer paid adjusted assessments and then filed applications for abatement).

[8]The taxpayer's argument that due process requirements in tax deficiency cases are more stringent than those in tax collection cases is without merit. This distinction between "deficiency" and "collection" cases appears to be nothing more than a matter of semantics. In this case, for example, the department asserted that there was a deficiency in Leger's sales tax payment, so it assessed additional sales taxes and then sought to collect them. Leger disputes whether there was a deficiency and seeks to prevent the department from collecting additional taxes. Thus, this case might be called a "deficiency" case, a "collection" case, or both.

During the ten-day period following the demand for payment of the assessment, Leger could have paid the assessment in cash, or posted a bond for the amount due. Furthermore, pursuant to G. L. c. 62C, § 50 (*f*), and the department's administrative procedures, at any time following the attachment of his residence, Leger could have requested from the commissioner a release of the lien if he had offered alternative securities for the payment of the assessed taxes. Leger did not avail himself of any of these opportunities, and as a result, the department attached a lien to his property. Accordingly, it was only through Leger's refusal to pay the assessed taxes or to post some security for the payment of the assessed taxes that his real property was attached. Leger cannot now argue that he is entitled to different procedural rights from those afforded to taxpayers who pay their assessments or post bond and then argue the validity of the tax through the abatement process.

We conclude that the due process rights of Leger, like any other taxpayer, can be satisfied by postdeprivation proceedings. Although the attachment of a tax lien to his property may result in some hardship to Leger, cf. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 747 (1974) (recognizing "precarious financial position" which may be faced by nonprofit entity while tax dispute is resolved), he is not in a position significantly different from a taxpayer who pays the assessment and proceeds with postdeprivation remedies. Leger may lose the ability to mortgage or otherwise to alienate his property, but similarly the taxpayer who pays the assessment up front loses the ability to use the money to make purchases or other investments. Leger will not receive interest as might a taxpayer who in the end is entitled to "a refund of overpayment," see 803 Code Mass. Regs. § 62C.26.1 (17) (d) (1993), but he retains the ability to use and enjoy his property, albeit to a lesser extent.

As the record in this case demonstrates, the procedures used by the department clearly notified Leger that, if he failed to pay the assessment within ten days of the demand, his property would be attached. Indeed, G. L. c. 62C, § 50

(*a*), specifically provides that a tax lien "shall arise [on all property of the taxpayer] at the time the assessment is made or deemed to be made." Leger received this demand for payment after he had participated in proceedings before the appeal bureau of the department.[9]

As his final argument, Leger contends that the prospect of a long-delayed proceeding before the board violates due process.[10] Leger does not argue that such proceedings themselves are not consonant with due process, but rather that the long delay before the board considers his case will frustrate the requirements of due process. This may be so, but we believe that this issue is a matter initially for the Legislature, or, one that can be addressed only when it is ripe for judicial review, in an appeal from a decision of the board. Cf. *Schipani* v. *Commonwealth*, 382 Mass. 685, 686 (1980) (affirming single justice's dismissal of action where factual record not adequate enough to address constitutional claim).

The judgment allowing the commissioner's motion to dismiss is affirmed.

So ordered.

[9]We need not discuss whether the proceedings before the appeal bureau, which could be characterized as a predeprivation hearing in this case, would satisfy the demands of due process.

[10]Leger asserts that even when his case is heard by the board, the board will not consider the constitutionality of the attachment of his property. In light of our treatment of the attachment as the equivalent of paying the assessment up front, we see no reason why the board would need to consider the constitutionality of the attachment.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

AT BOSTON,

September 13, 1995

In the Case No. SJC-06772

WALTER R. LEGER

vs.

COMMISSIONER OF REVENUE

Pending in the Superior Court Department of the Trial Court for the County of Worcester -- No. 93-02589

ORDERED, that the following entry be made in the docket; viz., --

The judgment allowing the commissioner's motion to dismiss is affirmed.

BY THE COURT,

s/Susan Mellen, Asst. Clerk

September 13, 1995
SEE OPINION ON FILE.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. SUPERIOR COURT
CIVIL ACTION
NO. 93-2589-A

WALTER R. LEGER d/b/a
OFFICE CHAIR MAINTENANCE CO.

vs.

MITCHELL ADAMS, as he is
Commissioner of Revenue

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND MOTION TO DISMISS

The plaintiff, Walter R. Leger ("Leger"), filed this civil action seeking declaratory and injunctive relief from a tax lien filed by the defendant, the Commissioner of Revenue ("the Commissioner"), against Leger's residence for an unpaid sales tax assessment. In Count I, Leger seeks a declaration that the cost of labor in reupholstering furniture, a commercial activity in which he engages, is a service which is not subject to the sales tax under G.L. c. 64, s.s.1 and 2. Leger seeks a declaration in Count II that the Commissioner's filing of a tax lien without first providing Leger with an opportunity for a judicial hearing on the underlying tax liability violates due process as guaranteed by the Fourteenth Amendment to the United States and Article X of the Constitution of Massachusetts. Leger has moved for partial summary judgment on Count II regarding his due process rights as

guaranteed by the U.S. Constitution. The Commissioner has moved to dismiss Count I under Mass. R. Civ. P. 12(b)(1) for failure to exhaust administrative remedies. Regarding the claim for declaratory relief in Count II, the Commissioner has moved for partial judgment on the pleadings under Mass. R. Civ. P. 12(c), requesting a declaration that the Commissioner did not violate Leger's due process rights. The Commissioner has also moved to dismiss the claim for injunctive relief for Count II under Mass. R. Civ. P. 12(b)(6).

BACKGROUND[1]

Between 1975 and October 1987, Leger did business as Office Chair Maintenance Company ("the Company"), a sole proprietorship that reupholsters worn office chairs brought in by customers.[2] Leger collected a sales tax from his customers for the cost of any materials used, but did not charge or collect sales tax on the cost of the labor.

---

1. As both parties have filed affidavits in support of their motions, the court will treat them as motions for summary judgment. This section contains the material undisputed facts.

2. The Court will not consider certain of Leger's allegations regarding a non-party corporation, Office Chair Maintenance, Inc., which was the sole proprietorship's successor in interest. As that corporation is presently in Chapter 7 bankruptcy proceedings, its claims may only be asserted by its bankruptcy trustee. See 11 U.S.C. s.s.541, 704.

After examining Leger's books, the Audit Bureau ("the Audit Bureau") of the Department of Revenue ("the Department") determined that the Company should have collected sales tax on the labor charges and disallowed Leger's deduction for his labor charges. On or about September 14, 1990, the Audit Bureau sent a Notice of Intention to Assess Sales and Use Tax to Walter R. Leger d/b/a Office Chair Maintenance Co. for the periods from January 1, 1985 through September 30, 1985 and July 1, 1987 through September 30, 1989. Leger waived his right to an office conference under G.L. c. 62, s.26(b), but requested an administrative hearing before the Department's Appeal and Review Bureau ("the Appeal Bureau"). The Appeal Bureau held a hearing on April 19, 1991 to consider Leger's challenge to the proposed assessment contending that reupholstering is not "fabricating personal property" subject to sales tax under G.L. c. 64H, s.s. 1 and 2 and instead is exempt as charges for personal services. In a letter dated April 24, 1992, the Appeal Bureau notified Leger that, in its opinion, reupholstering constitutes the taxable sale of tangible personal property.

On May 11, 1992 the Commissioner made a deficiency assessment. A notice of assessment was mailed to Leger on June 23, 1992, a Demand was sent out on August 8, 1992, and a consolidated bill went out on September 1, 1992. The Department notified Leger by letter dated September 2, 1992 that the Department would commence collection prcceedings against him if he failed to pay the tax assessment within ten days. The Department's letter warned

that the collection proceedings "can and will include the filing of tax liens against your property, levying your bank accounts and/or wages and seizures of your assets." The Department filed a Notice of Massachusetts Tax Lien ("Lien Notice") with the Secretary of State under G.L. c. 62C, s.50 on or about November 6, 1992.[3] The Commissioner also recorded notice of the lien in the Worcester County Registry of Deeds. The lien is against Leger's residence in Fitchburg.

In early September of 1992, Leger applied pursuant to G.L. c. 62C, s.37 to the Commissioner for an abatement of the sales tax which had been assessed. The Commissioner denied Leger's abatement request in two partial decisions, one issued on or prior to December 16, 1992,[4] the other dated April 5, 1993. Leger filed appeals with the Appellate Tax Board pursuant to G.L. c. 62C, s.39(c) on December 16, 1992 and May 10, 1993. Thus, at the time the Department filed the Lien Notices, Leger had had a hearing before the Department Appeal Bureau but had not

---

3. The parties dispute whether or not notice was given to Leger. Leger contends that he first learned of the lien on December 11, 1992 when his application for an equity line of credit was denied because of the lien's existence. In the context of this decision, this is not a material fact.

4. The date of the first denial is unclear from the pleadings. However, it likely preceded December 16, 1992, the date when Leger filed his appeal with the Appellate Tax Board.

had a determination of the Commissioner's abatement decision, a hearing before the Appellate Tax Board or a judicial hearing. The lien has now been in place for over a year and a half but the Appellate Tax Board has yet to issue a decision.

DISCUSSION

I. Exhaustion of Administrative Remedies

Leger seeks a declaration from the Court that reupholstering does not constitute "fabricating personal property" for purposes of G.L. c. 64H, s.1,[5] and is therefore not subject to sales tax under G.L. c. 64H, s.2.[6] The Commissioner, in contrast, has moved to dismiss this claim under Mass. R. Civ. P. 12(10)(1) for failure to exhaust his administrative remedies as provided for by various Massachusetts General Laws. Leger has failed to show why this court should

---

5. Section 1 of G.L. c. 64H includes within the definition of a "sale" or "selling" transaction that is subject to the sales tax "[t]he . . . fabricating . . . of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the . . . fabricating. . . ."

6. Section 2 of G.L. c. 64H provides in relevant part: "an excise is hereby imposed upon sales at retail in the commonwealth, by any vendor, of tangible personal property or of services performed in the commonwealth at the rate of five percent. . . ."

exercise jurisdiction over this matter before it is heard by the Appellate Tax Board.

Under Massachusetts law, the Commissioner may determine that a taxpayer owes additional tax above the amount shown on a tax return and make an assessment on that amount. G.L. c. 62C, s.26(b). However, before an assessment can be made, the Commissioner must first give notice to the taxpayer of the proposed assessment. Id. The taxpayer then has 30 days to consult with the Department regarding the proposed assessment. Id.[7] At the time the Commissioner makes the deficiency assessment, a lien is automatically created. Id., s.50(a). However, the lien is only valid against "any mortgagee, pledgee, purchaser or judgment creditor" after notice of the lien has been recorded with the Registry of Deeds in the case of real estate. Id. s.50(b).

The taxpayer may contest a deficiency assessment by requesting that the Commissioner abate the assessment. Id., s.37. The taxpayer may request a hearing on the abatement request. Id. If the Commissioner fails to grant the abatement, the taxpayer may then appeal to the Appellate Tax Board. Id. at s.39. The taxpayer may appeal an adverse decision of the Appellate Tax Board to the Supreme Judicial Court. G.L. c. 58A, s.13. In limited circumstances, a taxpayer may also seek declaratory relief, under G.L. c. 231A, from the Superior Court.

---

7. There are certain statutory exceptions which are not relevant here.

The statutory tax abatement procedures "are exclusive, absent exceptional circumstances." D'Errico v. Board of Assessors of Woburn, 384 Mass. 301, 306 (1981). Exhaustion is generally required unless the administrative remedy is seriously inadequate, the issue at stake is important, novel, or recurrent, the decision has public significance affecting many taxpayers or the case is reduced purely to a question of law. Space Building Corp. v. Commissioner of Revenue, 413 Mass. 445, 448 (1992). This court has discretion to hear such claims, id., but doing so is generally disfavored. Ralph's Wonder, Inc. v. Commissioner of Revenue, 19 Mass. App. Ct. 928, 929 (1984). See S.J. Groves & Sons Co. v. State Tax Commission, 372 Mass. 140, 143 (1977) (while Superior Court consideration of whether certain items purchased by a contractor were exempt from sales tax was acceptable, Supreme Judicial Court "would probably have left it to the Appellate Tax Board").

In the case at bar, Leger's claim does not involve exceptional circumstances that require this court to assert jurisdiction. Instead, Leger's claim involves a technical tax issue as to which the Appellate Tax Board is "the preferred forum . . . because of its special expertise in tax matters." DiStefano, 394 Mass. at 321. The plaintiff has an adequate remedy at law by pursuing his two abatement proceedings before the Appellate Tax Board. See Bettigole v. Assessors of Springfield, 343 Mass. 223, 235 (1961); Madden v. State Tax Commission, 333 Mass. 734, 736 (1956) (declaratory relief appropriate no where assessment had been made so that no administrative remedies

were available). Thus, it would be inappropriate to order declaratory relief and Count I is, accordingly, dismissed.

II. Due Process

Leger contends that his due process rights, as guaranteed by the Fourteenth Amendment of the United States Constitution, prevent the Commissioner from placing a lien on his home without prior notice and an opportunity for him to be heard by a judge. Leger asserts that, absent exigent circumstances, the Commissioner cannot unilaterally place a lien on a taxpayer's home without first proving to a judge that the taxpayer does in fact owe unpaid taxes and there is a realistic risk that the taxpayer will hide his assets. His argument relies heavily upon the recent United States Supreme Court decision, United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993). However, as discussed below, this case does not place new restrictions on the government's ability to extract taxes from its citizenry.

The placing of a lien on an individual's private residence does affect a property interest that is protected by the Fourteenth Amendment. Connecticut v. Doehr, 501 U.S. 1, 11-12 (1991); Mathews v. Eldridge, 424 U.S. 319, 332 (1976). Like an attachment, a lien affects significant property interests. It clouds title, impairs the ability to sell or otherwise alienate the property, taints any credit rating, reduces the chance of obtaining a home equity loan or additional mortgage and may place an existing mortgage in technical default if there is an insecurity clause. Id. at 2113. Given

that the government is infringing upon a protected property interest, the crucial question becomes what process is due the taxpayer. Mathews, 424 U.S. at 332-333. The general rule is that individuals must receive notice and a hearing prior to government deprivation of their property. James Daniel Good Real Property, 114 S. Ct. at 500. Exceptions to this rule are tolerated only in "extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event." Id. at 501, quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

However, the Supreme Court has consistently determined that the collection of taxes by summary process, with judicial review only afforded after the assessment, does not violate due process.[8] McKesson v. Division of Alcohol Beverages & Tobacco, 496 U.S. 18, 37 (1990); G.M. Leasing Corporation v. United States, 429 U.S. 338, 352 n. 18 (1977);

---

8. While the Commissioner may be legally correct in arguing that Leger has received all the constitutionally required process due him, it is clear the post-deprivation relief he has been afforded leaves much to be desired. There is evidence before the court that the Appellate Tax Board has a significant backlog which is only increasing with time. Leger himself filed his first appeal over a year and a half ago, prior to or on December 16, 1992 and a second one over a year ago, on April 5, 1993. The Appellate Tax Board has not acted on such appeals. Leger's palpable frustration with this regrettable delay is quite understandable.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974); Phillips v. Commissioner, 283 U.S. 589, 599 (1931). The government's interest in collecting taxes is so "exceedingly strong" that a state need not provide predeprivation process, even in the absence of exigent circumstances. McKesson, 496 U.S. at 37. The policy underlying this rule is the fear that allowing taxpayers to litigate their tax liabilities prior to payment "might threaten a government's financial security," by creating "unpredictable interim revenue shortfalls" and making the "ultimate collection of validly imposed taxes more difficult." Id. See also G.M. Leasing Corporation, 429 U.S. at 352 n. 18 ("[T]he very existence of government depends upon the prompt collection of revenues").

The plaintiff points to one section of the Good decision which he interprets as calling this traditional rule into question. See Good, 114 S.Ct. at 504-505. The Good decision concerned a federal civil forfeiture statute pursuant to which the government effected the ex parte seizure of a convicted drug felon's home. Id. at 499. The Supreme Court held that, absent exigent circumstances, the due process clause requires the government to provide the home owner with notice and a hearing prior to seizure of his home. Id. at 505. In its analysis, the Court rejected the government's contention that ex parte forfeitures were, like tax seizures, justified as a means of collecting revenue. Id. The Court's historical discussion of ex parte tax seizures is, however, merely dicta and cannot be viewed in the expansive manner which Leger urges. The Supreme Court

specifically noted that it reached its holding "without revisiting these [old tax] cases." Id. at 504. The dicta in Good simply cannot be fairly construed as impliedly reversing a rule of law which the Supreme Court itself affirmed as recently as 1990. McKesson Corporation, 496 U.S. at 37 "([I]t is well established that a State need not provide predeprivation process for the exaction of taxes.")

For similar reasons, Leger's claim under Article 10 of the Declaration of Rights of the Massachusetts Constitution also fails. It is well established that the due process provisions of the Massachusetts Constitution provide protection comparable to that of the Fourteenth Amendment. Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 270 (1992); School Committee of Hatfield v. Board of Education, 372 Mass. 513, 515 n. 2 (1977) ("The protection afforded property interests by both provisions is subject to the same analysis"). The Court has rejected arguments similar to those now proffered by Leger, albeit made under the Fourteenth Amendment and not Article 10. The Court has "repeatedly held that, to sustain the orderly functioning of government and safeguard the integrity of the public purse, tax officials may assess and collect taxes before vouchsafing the taxpayer a right to hearing and judicial review as to the legality of the assessment." Haverhill Manor, Inc. v. Commissioner of Public Welfare, 368 Mass. 15, 25 (1975), citing Old Colony Railroad Co. v. Assessors of Boston, 309 Mass. 439, 446 (1941).

ORDER

It is hereby ORDERED that the plaintiff's motion for partial summary judgment is DENIED, and the defendant's motion for partial judgment on the pleadings and motion to dismiss is ALLOWED.

/s/Barbara A. Lenk
Barbara A. Lenk
Justice of the Superior Court

Dated: July 15, 1994

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF WORCESTER
THE SUPERIOR COURT

CIVIL DOCKET NO.
WOCV93-02589

RE: Leger v Adams Commissioner

TO: Carl Emmett Baylis
27-29 Mechanic Street
Worcester MA 01608

NOTICE OF JUDGMENT ENTRY

This is to notify you that a judgment in the above-referenced action has been entered on the docket. A copy of the judgment is attached.

Dated at Worcester, Massachusetts this 17th day of October, 1995.

Loring P Lamoureux,
Clerk of the Courts

BY:
Asst Clerk (to be assigned)
Telephone: 508-756-2441,
Ext 198-FOR MOTIONS
& Ext 216-FOR TRIALS